(2) (2)

Nos. 91-261, 91-274

In The

Supreme Court of the United States

October Term, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioners,

vs.

ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,

Respondents.

(Continued)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MAURICE BASKIN
Counsel of Record
VENABLE, BAETJER, HOWARD & CIVILETTI
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

CAROL CHANDLER
STONEMAN, CHANDLER & MILLER
99 High Street
Boston, Massachusetts 02110
(617) 542-6789

Attorneys for Respondents

967
Byrd Appellate Printers, Inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114 DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

October Term, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY and KAISER ENGINEERS, INC.,

Petitioners,

vs.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

Respondents.

QUESTION PRESENTED

1. Whether this Court should review a Court of Appeals' holding that governmental interference with the process of private sector collective bargaining is preempted by the National Labor Relations Act, where the holding is entirely consistent with recent, controlling Supreme Court decisions, and no conflict among the Circuits has been shown to exist.

TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Nos. 91-261, 91-274

In The

Supreme Court of the United States

October Term, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, *et al.*,

Petitioners,

vs.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., *et al.*, hereby respond to separate petitions filed concerning the same judgment by the Building and Construction Trades Council of the Metropolitan District ("BCTD"), No. 91-261, and The Massachusetts Water

Resources Authority ("MWRA") and Kaiser Engineers, Inc. ("Kaiser"), No. 91-274. Respondents request that this Court deny the petitions for a writ of certiorari to review the opinion by the Court of Appeals for the First Circuit in this case. That opinion is reported at 935 F.2d 345.[1]

STATEMENT OF THE CASE

The Massachusetts Water Resources Authority ("the MWRA") is a governmental agency authorized by the Massachusetts Legislature to provide water supply services and sewage collection, treatment and disposal services for the eastern half of Massachusetts. The MWRA is charged with effecting a large series of public works projects over a ten year period for the purpose of cleaning up the Boston Harbor and surrounding areas (JA18-20).

The means and methods of carrying out this task are set forth in the MWRA's enabling statute, Mass. Gen. Laws, Ch. 92, § 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws, Ch. 149, §§ 45A-45L and Ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control over all aspects of the project.[2]

In May, 1988, the MWRA appointed a "Project Contractor",

1. Respondents have no parent or subsidiary companies to list in accordance with Rule 29.1 of this Court.

2. As is acknowledged by the petitioners (MWRA Pet. at 18, n.8), Massachusetts law requires that the MWRA itself award all construction contracts through a competitive bidding process, pursuant to statutorily prescribed bid specifications.

Kaiser Engineers, Inc. ("Kaiser"), to oversee the construction of new treatment facilities and the upgrading of existing facilities required for the clean-up (JA17). Work on the project began, using both union and non-union contractors. In November of 1988, two member unions of the Building and Construction Trades Council ("the Trades Council") picketed the project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site, a well recognized method of maintaining continuity of work in the construction industry (JA277-8). Other threats were made to disrupt the work, but no other significant disruption actually occurred. (*Id.*).

On May 22, 1989, Kaiser, acting as MWRA's agent, entered into the MWRA Agreement with the Trades Council. The Agreement states that it was negotiated by Kaiser "on behalf of" the MWRA, and with MWRA's express approval (JA43, Agreement Caption, p.i.). Both Kaiser and the Trades Council understood that the Agreement could not be implemented without MWRA's approval (JA381). Subsequently, the MWRA did approve the Agreement and incorporated it into all advertisements for bids on project contracts (JA23, Bid Specification 13.1).

The Agreement, which all contractors and subcontractors who bid on the project were required to sign pursuant to Specification 13.1, required that the petitioner Trades Council's member unions serve as the sole and exclusive bargaining representatives for all craft employees on project contracts (Art. III, § 1), and that all employers awarded work on the project must be bound by the Trades Council unions' collective bargaining agreements, which were expressly incorporated by reference (Art. IX, XI). This meant, *inter alia*, that all employees would be referred by local union hiring halls (*id.* §§ 2, 3), that all employees would be subject to the union's compulsory membership provisions and local collective bargaining agreements (*id.* § 4), and that employers were required

to make contributions to a variety of union benefit trust funds and to observe restrictive union work rules and job classifications (Art. IX) (JA54-58, 64-66, 71, 76-77).

Because the Agreement was incorporated into the bid specifications for all work on the project, Plaintiffs could not bid for this government work without waiving their rights to negotiate freely with a union representing a majority of their employees. Thus, the MWRA Agreement forced the plaintiffs and other contractors, both union and non-union, to abandon their right to negotiate their own terms of employment or to operate on a non-union basis, in order to obtain work on this government project.

The "union-only" restriction, imposed on all successful bidders and subcontractors, effectively deterred non-union contractors from bidding on project work. The imposition of specific contract terms adversely affected numerous unionized contractors as well.[3] The MWRA Agreement thereby reduced the degree of competition in the bidding process and also threatened to increase the overall cost of the project (JA207-208, 217-218).

Approximately 75% of all construction work in this country is performed on a non-union basis (JA200). Only 21% of all employees in the construction industry are union members. (*Id.*). In Massachusetts, more than 60% of all construction work is performed on a non-union basis (JA216). Non-union employers and employees have performed hundreds of construction jobs in the Commonwealth working side by side with unionized firms, without significant labor disruption (JA206, 216).

---

3. Amicus briefs were filed in support of ABC's position before the Court of Appeals by the National Association of Manufacturers and by the Utilities Contractors Association of New England, both of whom represent many unionized employers.

Contrary to petitioners' claims (BCTC Pet. at 12; MWRA Pet. at 12), there is no evidence in the record of this case that "union-only" project agreements are "widely-used" by state or local governments anywhere in the country. In this regard, it is important to distinguish between "project labor agreements," which may properly establish certain conditions of employment without interfering in the process of collective bargaining, and a "union only" agreement such as that which is at issue in the present case, which requires actual recognition of unions and agreement to a union contract. Only the latter type of agreement, of which there is no record evidence from other states, requires private employers to recognize and adopt union collective bargaining agreements as a condition of performing government work.[4]

In September, 1989, respondents protested the government's enforcement of the MWRA Agreement to the Massachusetts Department of Labor and Industries (JA125). The protest was denied,[5] and the respondents filed suit in the United States District

---

4. The BCTC Petition confuses the two types of agreements in seeking to characterize the type of agreement enforced by the MWRA as "widely used" (BCTC Pet. at 12). The petitioners also list various project agreements supposedly involving government entitles, many of which were either not local government projects or were not "union-only" (BCTC Pet. at 12-13, n.5; MWRA Pet. at 12). More importantly, the project agreements listed by petitioners are nowhere to be found in the record of this case, and should be stricken or disregarded. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 156, n.6 (1970). ("Manifestly, [extra-record evidence] cannot be properly considered by us in the disposition of the case.") Ironically, the only record evidence of another state's project labor agreement was introduced by *respondents* and demonstrated how a large tunnel project had been built without any union-only requirements (JA451).

5. The Deputy General Counsel of the Department's Civil Division agreed with Respondents that the MWRA Agreement constituted governmental interference with the collective bargaining process in violation of the National

(Cont'd)

Court seeking declaratory and injunctive relief for numerous violations of their statutory and constitutional rights (JA11). In addition, respondents asked for a preliminary injunction against enforcement of the MWRA Agreement through any bid specifications which required private contractors to waive their statutory bargaining rights as a condition for receiving government work (JA141).[6]

The District Court denied respondents' motion and an appeal followed (App. 72a-83a). On October 24, 1990, a unanimous panel of the Court of Appeals for the First Circuit reversed the District Court and issued the requested preliminary injunction (App. 49a-71a). The Court of Appeals granted rehearing *en banc* and then reaffirmed its decision by a 3-2 vote (App. 1a-48a). Both the panel opinion and the *en banc* decision found that the state agency's enforcement of the "union-only" Agreement as a condition for the award of government work to private contractors constituted unlawful governmental inteference in the collective bargaining process in a manner preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*[7]

(Cont'd)
Labor Relations Act (JA423, 427-433). He was ultimately overruled on other grounds, with no further discussion of the preemption issue at the administrative level.

6. Respondents did not seek to delay the clean-up project itself in any way, nor is there any record evidence of delay attributable to respondents' motion.

7. The preliminary injunction ordered by the panel opinion remained in effect during the Court of Appeals' reconsideration and has of course remained in place since the en banc reaffirmance. During this period of nearly one year, there is no evidence that any of the speculative concerns raised by the petitioners in support of the Agreement, such as increased labor disputes or construction delays, have occurred.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that the MWRA's imposition of union collective bargaining agreements on private employers as a condition of their performing government work was preempted by the National Labor Relations Act. The court found that the MWRA's enforcement of its "union-only" project agreement directly interfered with, and indeed "eliminated", the process of private sector collective bargaining.

Contrary to petitioners' claims, this result was squarely within the confines of this Court's decisions on the subject of labor law preemption. *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608 (1986) (*Golden State I*), and 110 S. Ct. 444 (1989) (*Golden State II*); *Machinists v. Wisconsin Emp. Rel. Commission,* 427 U.8. 132 (1976).

Petitioners have failed to identify any conflict between the First Circuit's decision and any decision of this Court. Nor have they identified any conflict among the Circuits concerning the issue presented for review. Indeed, as petitioners have acknowledged, the only other Court of Appeals to consider this issue has reached the same result as the First Circuit. *Glenwood Bridge, Inc. v. City of Minneapolis,* ____ F.2d ____, 137 LRRM 3001 (8th Cir. Aug. 2, 1991). Under these circumstances, and particularly in light of the interlocutory procedural posture of this case, no useful purpose would be served by Supreme Court review, and the petitions should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY APPLIED SUPREME COURT AUTHORITY PROHIBITING GOVERNMENTAL INTERFERENCE IN THE PROCESS OF PRIVATE SECTOR COLLECTIVE BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT, AND NO CONFLICT ON THIS ISSUE EXISTS WITHIN THE CIRCUITS.

A. The First Circuit's Decision Is Fully Consistent with this Court's Holdings on Labor Law Preemption.

The present case involves an attempt by a state government agency to interfere pervasively in the process of private sector collective bargaining. In enjoining such state interference, the Court of Appeals applied in a straightforward manner recent decisions by this Court which are directly on point and which properly dictated the outcome below. *See Golden State Transit Co. v. City of Los Angeles,* 475 U.S. 608 (1986), and 110 S. Ct. 440 (1989). *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 724 (1976); *see also, Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

Contrary to petitioners' claims (MWRA Pet. at 14-21; BCTD Pet. at 14-24), the decision below neither expands nor alters the principles set forth by this Court in the *Golden State Transit* cases. Rather, the First Circuit properly applied the plain holding of *Golden State Transit* to prevent direct local government interference with the process of collective bargaining.

In *Golden State Transit,* the Court preempted a city's attempt to condition a private employer's continued ability to obtain a city franchise on that employer's adoption of a union agreement. The Court held that the city's actions constituted an attempt to regulate conduct associated with the bargaining process, which Congress intended to be left unregulated by any governmental party. Thus, in *Golden State I,* the Court squarely held:

> Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA . . . . Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations . . . . A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."

475 U.S. at 619 (citations omitted).

In *Golden State II,* which upheld the award of damages to the employer under the NLRA and 42 U.S.C. § 1983, the Court made even more explicit its ruling prohibiting governmental interference in the process of private sector collective bargaining:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. "[T]he Congressional intent in enacting the comprehensive federal law of labor relations"

> required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or state", . . . is excluded.

110 S. Ct. at 451 (citations omitted). Finally, so that there could be no doubt as to the protection of private sector collective bargaining rights from governmental interference, the Court held:

> The *Machinists* Rule is . . . akin to a rule that denies either sovereign the authority to abridge a personal liberty . . . [T]he interest in being free of governmental regulation of "the peaceful methods of putting economic pressure on one another" . . . is a right specifically conferred on employers and employees by the NLRA.

110 S. Ct. at 451-52.

In the present case, the MWRA's intrusion into the process of collective bargaining was even more direct than the government actions which were found to be unlawful in the *Golden State Transit* and *Machinists* cases. As the Court of Appeals observed, at App. 17a:

> In the present case, the state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here eliminates the bargaining process altogether.

Respondents have never claimed, nor did the Court of

Appeals suggest, that state governments are forbidden to regulate specific labor conditions which may also be subjects of collective bargaining. *See e.g., Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985). The enjoined Agreement, however, did not merely "relate" to or "impact" upon collective bargaining (MWRA Pet. at 15-16), it eliminated the *process* of collective bargaining altogether. It is for that reason that the state's action was found to be preempted, a result clearly compelled by *Golden State Transit* (App. 17a).

The Court of Appeals also properly held that Sections 8(e) and/or 8(f) of the NLRA provide no license for a state agency to interfere in the collective bargaining process (App. 22a). Neither the petitioners nor the dissenters below have explained why statutory provisions which have been narrowly confined by their terms to "employers" in the "construction industry", should be interpreted so as to apply to a state agency which is neither an "employer" nor a "construction industry employer". *See* 29 U.S.C. § 152(2).

At bottom, the petitioners' complaint is that the state agency is being denied the opportunity to engage in conduct which might be permissible, if only the agency were a private entity. On this point, however, the Court of Appeals properly cited *Wisconsin Dept. of Industry v. Gould,* 475 U.S. 272, 289-90 (1986), in which this Court spoke directly to this issue:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints . . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [Citing *Machinists* and *Teamsters v. Morton*.] The Act treats state action differently from private action not merely because

they frequently take different forms, but also because on our system states simply are different from private parties and have a different role to play.

Once again, the *Golden State Transit* case is also directly on point. The city's conduct there, severing relations with a transportation carrier, would have been entirely permissible if done by a private purchaser of that carrier's services. Indeed, such actions are commonplace reactions of private companies confronted with strike interruptions affecting performance by service providers. This Court properly held, however, that the city's action in this regard constituted *governmental* interference with collective bargaining and was therefore preempted.

Similarly misguided is the petitioners claim that the Court of Appeals improperly intruded into "proprietary" interests of the state, which should somehow be entitled to different treatment from the state's "regulatory" activities (MWRA Pet. at 21-25). Here petitioners have quoted out of context from the *Gould* case, and have attempted to ignore the fact that *Gould* rejected the very distinction for which they now argue. As the Court of Appeals properly noted (App. 65a-66a), this Court in *Gould* held that the "market participant" doctrine, borrowed by petitioners from Commerce Clause cases, has no place in the law of labor preemption. As the *Gould* Court stated:

[T]he "market participant" doctrine reflects the particular concerns underlying the Commerce

Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted.

* * *

What the Commerce Clause would not permit states to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place.

* * *

[W]e cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration" under the NLRA as long as they did so through exercises of the spending power.

475 U.S. at 289-290 (citations omitted). *See also, Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. at 614 n.5 (1988). ("The fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis.").[8]

---

8. The record in this case further demonstrates that the proprietary/regulatory distinction argued for by the petitioners would "swallow the rule," as the Court of Appeals properly found (App. 20a). The state has not only sought to foreclose freedom in collective bargaining on the MWRA's ten year, $6 billion series of projects, but also intended to impose the same requirement on a series of large highway projects in Boston (JA542), Thus, the state would have foreclosed collective bargaining on an overwhelming percentage of all state-financed construction, which would have had the same effect as if the state simply passed a law barring non-union contractors from all state-financed construction.

Petitioners have also wrongly attempted to characterize the present case as somehow conflicting with the Court's recent decision in *Gregory v. Ashcroft,* 111 S. Ct. 2395 (1991). That case involved an entirely different statute, the Age Discrimination in Employment Act, 29 U.S.C. § 621, and an entirely different state function, *i.e.,* the selection of judges. Petitioners have ignored the principal basis for the Court's holding in that case, which was that the power of the states to select their own judges "is a decision of the most fundamental sort for a sovereign entity." *Id.* at 2400. The present case, by contrast, involves the NLRA, a statute in which Congress has plainly spoken against any governmental interference in the process of collective bargaining, and a state action which has plainly intruded into that process. *Machinists v. Wisconsin Emp. Rel. Comm'n,* 427 U.S. 132 (1976). Thus, the Court of Appeals properly enjoined the state's action here and no conflict exists with any holding of this Court.

B. Review of this Case Would Be Premature Due to the Absence of Any Conflict Within the Circuits and Due to the Interlocutory Procedural Posture of the Decision Below.

As petitioners have acknowledged (MWRA Brief at 12, n.5; BCTD Brief at 14), the only other Court of Appeals which has addressed the issues decided by the First Circuit has agreed completely with the holding of the court below. *Glenwood Bridge, Inc. v. City of Minneapolis,* ____ F.2d. ____, 137 LRRM (BNA) 3001 (8th Cir. Aug. 2, 1991). There is thus no conflict within the Circuits concerning the issues presented by the petitioners.

Absent any conflict within the Circuits, there would appear to be no reason for intervention by this Court. To the extent that the issues presented have any importance at all, they plainly fall within this Court's policy of exercising restraint in the grant of certiorari to allow further lower court analysis of varying fact patterns. *See McCray v. New York,* 461 U.S. 961, 863 (1983)

(Stevens, J.) (certiorari denied where issue requires "further study" in lower courts).

The procedural posture of the present case also makes it a poor candidate for review. The ruling appealed from is the granting of a motion for preliminary injunction, an interlocutory order. This type of interlocutory ruling has previously been held to militate against the granting of certiorari. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.,* 389 U.S. 327, 328 (1967); *American Const. Co. v. Jacksonville T.& K.R. Co.,* 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience . . . ").

As previously noted at p. 6, the injunction now being challenged has been in place for almost one year, with no record evidence of any inconvenience or harm to the petitioners, or to the Boston Harbor Project, resulting therefrom. It would therefore be a sound exercise of this Court's discretion to await a case with different facts, and/or a case presenting some actual conflict among the Circuits, prior to exercising review.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

MAURICE BASKIN
VENABLE, BAETJER,
HOWARD & CIVILETTI
Counsel of Record
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

CAROL CHANDLER
STONEMAN, CHANDLER
& MILLER
99 High Street
Boston, MA 02110
(617) 542-6789

Attorneys for Respondents

September 12, 1991